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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76- 1595

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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The National Association of Broadcasters respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 1, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, dated March 1, 1977, has not yet been officially reported. The "Sec-

ond Report and Order" of the Federal Communications Commission in Docket 18110 is reported at 50 F.C.C.2d 1046 (1975). The FCC's "Memorandum Opinion and Order" denying petitions for reconsideration of the "Second Report and Order" is reported at 53 F.C.C.2d 589 (1975).

The full texts of the opinions below are printed in the Appendices to the Petition for a Writ of Certiorari filed by the FCC in these cases on April 22, 1977, *sub nom. FCC* v. *National Citizens Committee for Broadcasting* (No. 76-1471). For convenience, references herein will be to the FCC's Appendices ("FCC App.").

JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1977. (FCC App. 159-60). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and 28 U.S.C. § 2350(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment and the pertinent provisions of the Administrative Procedure Act and the Communications Act are set forth in Appendix A to this Petition.

QUESTIONS PRESENTED

1. Whether an FCC rule prohibiting broadcasters from expressing their views through the publication of a daily newspaper in their local communities abridges First Amendment rights and exceeds the FCC's statutory authority.

2. Whether the Court of Appeals erred in finding it "irrational" for the FCC in a rulemaking proceeding to adopt a new licensing policy prospectively without applying the new policy retroactively to require divestiture by existing licensees previously found to serve the public interest.

3. Whether the Court of Appeals erred in requiring the FCC in a rulemaking proceeding to adopt a rule in the guise of a "presumption" that all existing affiliated co-located broadcast stations and newspapers are not in the public interest and must be divested, regardless of evidence of harm.

4. Whether the Court of Appeals erred in requiring the FCC in a rulemaking proceeding to find that a hoped for increase in diversity is more important than all other competing public interest considerations and must be given controlling weight.

STATEMENT OF THE CASE

This case arises out of a Federal Communications Commission (FCC) rulemaking proceeding, FCC Docket 18110, dealing with the publication of newspapers by radio and television broadcasters.

The portion of the rulemaking proceeding at issue here began in 1970 when the FCC issued a "Further Notice of Proposed Rulemaking," 22 F.C.C.2d 339 (1970) (hereinafter referred to as the "Further Notice"). The rules proposed in the "Further Notice" contained both prospective and retroactive provisions. In essence, the prospective provision would have banned the issuance of a license for a radio or television station to any applicant who directly or indirectly

owned, operated or controlled a daily newspaper in the community to be served by the broadcast station. Also, prospectively, any broadcaster who acquired or established a local daily newspaper would be required to give up its broadcast license within a year after acquiring or establishing the newspaper.

The retroactive provision of the proposed rules would have required divestiture by all existing broadcasters who did not meet the newly created ban on newspaper affiliation. Thus, without regard to the grant and repeated renewal of a broadcast license as being in the public interest and without regard to the quality of the broadcast service provided, any existing broadcaster affiliated with a local daily newspaper would be required to divest itself of either the broadcast station or the newspaper within five years after adoption of the rule. At the time of the "Further Notice," there were more than 400 existing broadcast stations that would have been subject to the proposed divestiture requirement.

In the "Further Notice" the FCC recognized "the far-reaching ramifications that such rules would have" and acknowledged that it had "insufficient information on the subject." (22 F.C.C.2d at 340). In particular, the FCC expressed its "substantial concern" about the possible adverse effects of divestiture. (*Id.* at 348). Accordingly, comments were invited to enable the Commission "to make a careful examination of the matter." (*Id.* at 340). The FCC also recognized that "many will challenge our authority to adopt the rules proposed" and invited comments and legal briefs on that issue. (*Id.* at 349).

The "Further Notice" generated an exhaustive proceeding extending over five years and participated in

by nearly 200 parties. In addition to the National Association of Broadcasters (NAB), parties filing comments with the FCC included the Department of Justice, several citizens groups, the American Newspaper Publishers Association, and numerous broadcasters and newspaper publishers. Extensive studies were undertaken by NAB and by other parties, and detailed documented reports were submitted to the FCC.[1] These studies dealt comprehensively with such topics as (1) the economic consequences of divestiture, (2) the effects of common ownership on competition, (3) the effects of common ownership on station performance, and (4) the multiplicity and diversity of media including the extent of media affiliation.

After consideration of the massive written record as well as three days of oral argument, the FCC announced its decision on the proposed rules in its "Second Report and Order," 50 F.C.C.2d 1046 (1975) (FCC App. 61) (hereinafter referred to as the "Second Report"). In the "Second Report" the FCC first concluded that it had authority under the Communications Act to promulgate the proposed rules and rejected constitutional arguments that the rules would violate the First and Fifth Amendments. (FCC App. 63-67). After summarizing the record before it, the Commission then discussed separately the prospective and the retroactive portions of the proposed rules.

With regard to a prospective rule governing the grant of new broadcast licenses, the Commission decided to promulgate a rule essentially as proposed in

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[1] A list of the parties and the major studies submitted are included in the FCC's "Second Report and Order," 50 F.C.C.2d 1046, 1090-94 (1975) (FCC App. 105-09).

the "Further Notice." (*Id.* 89-93). With respect to the retroactive rule, however, the Commission found that the record demonstrated that "additional public interest considerations" had to be weighed in evaluating the desirability of the "harsh remedy" of divestiture. (*Id.* 89, 98). Weighing these considerations, the Commission decided against compelling divestiture by all affiliated broadcast stations and local daily newspapers as originally proposed and adopted, instead, a narrower divestiture order limited to a defined category of cases. (*Id.* 93-101).

In deciding not to order universal divestiture, the Commission noted that its own staff study of programming data showed that newspaper affiliated television stations had a demonstrated record of "statistically significant superiority" in local news and other local nonentertainment programming as compared to other television stations. (*Id.* 93, n.26). The Commission also found that many of the broadcasters who would be required to divest had established "a long record of service to the public." (*Id.* 93). Many had been pioneers in the earliest years of broadcasting, often with the encouragement of the FCC at a time when broadcasting provided little "hope of profit," and they brought to broadcasting a journalism tradition rather than an interest merely in entertainment. (*Id.*).

The Commission also noted the evidence that universal divestiture would compel many sales substantially below market value, causing not only major losses to the owners but also significant "local economic dislocations." (*Id.*). The Commission also foresaw that the demands for equity capital to finance divestiture would reduce working capital available for programming service. (*Id.* 83, 93). Finally, the Commission was concerned that a massive divestiture order would "reduce local ownership" because "many sales would have to be to outside interests" who were neither concerned with nor knowledgeable about the local community in which the station operated. (*Id.* 93).

In terms of media diversity, the record before the Commission showed that the number of different available publications and broadcast outlets in most markets was already large and increasing. (*Id.* 75-76, 88-89). The record also showed a continued decline in newspaper-television affiliation as a result of normal market forces without the imposition of a divestiture order. (*Id.* 76, 95, n.29). The Commission also found it "an important point" that existing affiliated newspapers and broadcast stations do not necessarily reflect the same viewpoints and that, to the contrary, many have separate managements and independent reporting and editorial policies. (*Id.* 74-75, 104).

The Commission further found that there was not even a claim, much less a showing, that affiliated newspapers and broadcast stations had "committed any specific noncompetitive acts." (*Id.* 87-88). The Commission thus pointedly responded to the Department of Justice's position by observing: "Merely stating that all daily newspaper-VHF television combinations are inconsistent with the public interest and the antitrust laws is not enough." (*Id.* 95, n.29).

Thus, based on its experience and the enormous factual record before it, the Commission found that the public interest would not be served by the drastic step of universal divestiture. The Commission explained that "a mere hoped for gain in diversity is not enough" to justify "disruption for the industry and hardship

for individual owners" that would result from universal divestiture. (*Id.* 93).

> "Having said that our primary concern is diversity in programming service, we have analyzed the question of requiring full-scale divestiture under standards and with regard for considerations which are relevant under our broad public interest mandate. . . . After reviewing the record in this context, we believe that because of the disruption and losses which could be expected to attend divestiture—resulting in losses or diminution of service to the public—divestiture should be limited to use in only the most egregious cases."[3] (*Id.* 95).

Following the "Second Report," several parties filed petitions with the FCC for reconsideration or clarification. The Commission denied the petitions and formally terminated Docket 18110 in its "Memorandum Opinion and Order" dated June 5, 1975. 53 F.C.C.2d 589 (1975) (FCC App. 148-58).

A number of parties, including NAB, thereafter filed timely petitions with the Court of Appeals for the District of Columbia Circuit invoking the court's jurisdiction under 28 U.S.C. § 2342(1) to review the FCC's decision in its "Second Report." The court consolidated the petitions and on March 1, 1977, issued its decision in the consolidated cases. (FCC App. 1-60).

The Court of Appeals, in an opinion by Chief Judge Bazelon, affirmed the FCC's prospective rule, finding it to be rational and within the Commission's statutory

[3] The cases in which divestiture was to be ordered were those markets in which the same entity owned the only daily newspaper and either the only television station or only radio station. There are approximately 16 such markets. (*Id.* 95-99).

authority. (*Id.* 17-29). The court also rejected all constitutional objections raised. (*Id.* 29-33). However, the court reversed the agency's judgment that the case had not been made to justify ordering the sweeping across-the-board divestiture originally proposed. (*Id.* 36-60).

The court conceded that the record before the Commission was barren of any showing that universal divestiture would be in the public interest. In the court's view, "after years of study, the record was essentially inconclusive." (*Id.* 49). Nonetheless, the court held that, even with an "inconclusive" record before it, the FCC "could not rationally conclude" not to order universal divestiture. (*Id.* 57). The court ruled that the FCC was required to adopt "the presumption that cross-owned stations do not serve the public interest." (*Id.* 51). The court asserted that the "presumption" was supported by three sources: the provision in the Communications Act that the FCC is to "encourage the larger and more effective use of radio in the public interest"; the "policies of the First Amendment"; and the FCC's policy "that diversification of media sources is of central importance." (*Id.* 51-52).

Having thus found a "presumption" in favor of universal divestiture, the court next reviewed the competing policies that the FCC had found to weigh against divestiture, and concluded that none of them was sufficiently persuasive in its view to outweigh the "presumption." (*Id.* 52-56). Accordingly, while conceding that any benefits from divestiture "may be speculative," the court held that the FCC was compelled to order divestiture of all affiliated broadcast stations and newspapers in the same locality. (*Id.* 57, 59-60).

Following the Court of Appeals' decision, the FCC asked the court to stay its mandate with respect to the retroactive divestiture rule to permit the agency to seek review of the decision by this Court. The Court of Appeals, by order filed April 5, 1977, granted the request, provided that the Commission file its petition for a writ of certiorari no later than April 22, 1977. (FCC App. 161-67).

In accordance with the stay order, the Commission filed its petition with this Court on April 22, 1977. (No. 76-1471). To permit this Court to consider NAB's petition in conjunction with the FCC's petition, the present petition is also submitted before expiration of the time allowed by statute. 28 U.S.C. § 2201(a).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Decision Would Have a Sweeping Impact on the Communications Media Across the Country.

The Court of Appeals decision, if permitted to stand, would compel a sweeping restructuring of the country's communications media, including both print media and broadcasting. The decision puts in jeopardy the future ownership of more than 150 daily newspapers, some 145 radio stations and 65 television stations serving communities in 44 states.[3] Many of the newspapers and broadcast stations that would be subject to forced sales are locally owned, with deep-rooted community ties and long records of public service.

In economic terms alone, the impact of the decision would be massive. The value of newspaper and broad-

[3] A list of the newspapers and broadcast stations subject to the divestiture requirement is printed as Appendix B to this Petition.

cast properties subject to divestiture is estimated to exceed $2 billion.

As is discussed below,[4] the court in ordering this drastic action expands the reach of the FCC's regulatory authority and carves out a broad gap in the First Amendment for the government to regulate all forms of speech by use of the broadcast licensing power. The court at the same time, having expanded the scope of the FCC's statutory and constitutional authority, wields that power itself by mandating to the agency the policies it must promote, the policies and concerns to which it must give lesser or no weight, and the actions it must take to restructure the communications media.

The net result is that the Court of Appeals acts as the authoritative maker of national communications policy. Its action, in violation of the fundamental First Amendment limits on government power and in gross excess of the court's legitimate judicial review function, should not be permitted to stand.

2. The Ban Against Publication of Local Newspapers By Broadcasters Violates the First Amendment Guarantees of Free Speech and Press and Exceeds the FCC's Statutory Authority.

In constitutional terms, the FCC regulations mandated by the Court of Appeals would issue a blunt command to anyone who wishes to operate a radio or television station: if you want the government's permission to be a broadcaster, you must give up your First Amendment right to publish a daily newspaper in your community. This Court has never sanctioned such a bald infringement of First Amendment rights.

[4] See parts 2 and 3 of the Reasons for Granting the Writ, *infra*.

The rationale given by the FCC and the court to support such a command is diametrically opposed to the fundamental thrust of the First Amendment. Under the rubric of creating greater "diversity" in the communications media, the rules are necessarily premised on a belief by the authorities that certain persons speak "too much," that they are heard "too much" in the debate on public issues, and that they may have proportionately "too much" influence. Accordingly, the solution is to mute those voices so that a more "balanced" chorus will be heard.[8]

The First Amendment, however, is premised on precisely the opposite belief: that truly free debate is most likely to flourish without government intervention. The resulting debate may be undisciplined, out of tune and unbalanced, but that cacophony is preferable to the danger of empowering a federal agency to assume the role of maestro to conduct and control the chorus. As this Court reaffirmed so clearly only last year:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . . [*Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976).]

Nor can the prohibition against publication of a local daily newspaper be defended because it arises in the context of federal licensing. Whether the pen-

[8] In discussing alternative methods for regulating public debate, the Court of Appeals notes: "One way to attempt to equalize debate is by boosting the power of the weaker voice; another way is by reducing the power of the dominant one." (FCC App. 23, n.32).

alty for exercise of First Amendment rights takes the form of direct prohibition or the denial of a privilege is immaterial. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege." *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963).

Of course, the courts have recognized that the scarcity of available broadcast frequencies provides a practical necessity for governmental involvement in licensing the use of these frequencies. *NBC* v. *United States*, 319 U.S. 190 (1943). However, whatever the wisdom of that doctrine and whatever its current validity in light of technological advances since it was adopted, it is clear that scarcity of broadcast frequencies provides no basis for FCC regulation restricting other media. *Cf., Home Box Office, Inc.* v. *FCC*, —— F.2d —— (No. 75-1280, D.C. Cir., Mar. 25, 1977) (holding unconstitutional on First Amendment grounds portions of the FCC's regulations of cable, as opposed to broadcast, television).

Indeed, it is clear that the regulations here cannot be justified as an attempt to promote diversity *in broadcasting*, for by their nature they are not designed to increase the number of different voices in broadcasting. The regulations would be fully complied with and the FCC satisfied provided that broadcasters simply stop publishing local newspapers. Trading among broadcasters of local stations for distant ones would also satisfy the regulations, again with no increase in the number of broadcast voices either in a single market or nationally. Thus, whatever consid-

erations may affect normal First Amendment doctrine with respect to allocation of scarce broadcasting frequencies, those considerations cannot shield the FCC's regulations here.

In addition to their constitutional infirmities, the FCC's regulations are also invalid because they exceed the agency's authority under the Communications Act. As discussed above, the regulations directly control non-broadcast speech; they are designed to regulate not broadcasting, but rather mass communications generally.[8] Recognizing that the Act provides no specific authority to issue such a rule, the FCC relies upon its general power to grant broadcast licenses to serve the "public interest, convenience and necessity." 47 U.S.C. § 309(a).

This assertion of power, however, is contrary to the Commission's own longstanding interpretation of its authority as not including the power to broadly disqualify newspaper publishers from broadcast licenses. It also is contrary to the consistent Congressional view of the Act. For example, a proposed amendment to the Act in 1952 would have specifically prohibited the FCC from denying a broadcast license because the applicant was engaged in newspaper publishing. The amendment was passed by the House but deleted as "unnecessary" by the Conference Committee, which explained that:

[8] The FCC's sole statutory authority, of course, is to regulate "communications by wire and radio." 47 U.S.C. §§ 151, 152. Although this grant of authority is subject to flexible interpretation to include new technology, such as television, it does not provide any authority to regulate the press or communications generally.

> Under the present law the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or association with, a newspaper or other medium for gathering and disseminating information. [Conference Report No. 2426, 82d Cong., 2d Sess. (1952)].

The same view has also been expressed by the courts. In *Stahlman* v. *FCC*, 126 F.2d 124, 127 (D.C. Cir. 1942), which involved an FCC investigation of newspaper-FM radio affiliation, the court specifically cautioned that the FCC's authority to assess the qualifications of broadcast license applicants "'does not embrace and should not be extended by implication to embrace a ban on newspapers as such." *See also Tri-State Broadcasting Co.* v. *FCC*, 96 F.2d 564, 566 (D.C. Cir. 1938).

The question of the Commission's authority under the Act is not merely a technical one. It presents the critical question of whether the FCC's mandate from Congress is to oversee all the communications media in this country. The power to grant or withhold broadcast licenses was not intended by Congress to be wielded by the FCC as a tool for "reforming" the press to comport with the FCC's masterplan. Particularly in light of the grave constitutional implications of such a power, see *supra* 11-15, it should not be presumed in the absence of clear and express authority from Congress.

3. The Court of Appeals' Requirement That The FCC Must Act Retroactively to Order Divestiture Usurps The FCC's Policy-Making Function.

(a) The Court Deprives the FCC of the Flexibility and Fairness of Prospective Rulemaking.

In ruling that the FCC could not adopt a prospective rule only but *must* also order broadscale divestiture of broadcast stations and newspapers, the Court of Appeals grossly exceeded its legitimate judicial review function. The FCC's "Second Report" was the product of a rulemaking proceeding under Section 4 of the Administrative Procedure Act. 5 U.S.C. §553 (1970). In reviewing such orders, the Court of Appeals' statutory function is to determine whether the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A)(1970). It is axiomatic that the court may not substitute its judgment for that of the agency. *E.g., NLRB* v. *Enterprise Association of Steam Pipefitters Local 638,* 45 U.S.L.W. 414 (Feb. 22, 1977).

Here, however, the court did substitute its judgment for the FCC's. The court, by the palpably makeweight device of creating a "presumption" and the *de novo* weighing of evidence and policies, in effect deprives the FCC of the discretion to regulate by prospective rulemaking. In so doing, the court seriously erodes the agency's authority and deprives the agency of the flexibility of one of the most important tools of administrative regulation.

Prospective rulemaking is a common and important procedure of administrative agencies. Indeed, the flexibility and fairness of prospectivity is one of the major advantages of rulemaking as compared to other forms

of regulation. K. Davis, *Administrative Law* §603 at 142-43 (3d ed. 1972). While an agency may make rules with retroactive effect, the courts have recognized that prospective rules are the norm and retroactivity can be condoned only if required by a public necessity. *E.g., United States* v. *Maher,* 307 U.S. 148 (1939); *NLRB* v. *E & B Brewing Co.,* 276 F.2d 594, 600 (6th Cir. 1960); *Buckeye Cablevision, Inc.* v. *FCC,* 387 F.2d 220, 228 (D.C.Cir. 1967).

This Court has made clear that prospective rulemaking is the preferred method of regulation. In *SEC* v. *Chenery Corporation,* 332 U.S. 194 (1947), the Court recognized that the manner of proceeding is a choice "that lies primarily in the informed discretion of the administrative agency." 332 U.S. at 203. At the same time, the Court also left no doubt as to the preference for prospective rulemaking:

> The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. [*Id.* at 202].

In keeping with this directive, the FCC's longstanding practice has been to prefer prospective rulemaking, and it has often adopted prospective rules without imposing the rule retroactively to require divestiture by existing licensees.[7] In the present rulemaking proceeding, the FCC again acted in precisely this manner as prescribed by this Court in *Chenery;* the Court of Appeals held it was "irrational" for it to do so. (FCC App. 56-57).

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[7] A description of some of the agency's past actions is contained in the FCC's Petition in these cases. FCC Petition at 8-9.

(b) The Court's Controlling "Presumption" is But a Subterfuge for Dictating Policies to the FCC.

The key to the court's decision compelling retroactive application was the creation of a controlling "presumption" that affiliation of a newspaper and a broadcast station is adverse to the public interest. In our view, the record compiled before the Commission demonstrated clearly that existing broadcast stations affiliated with local newspapers have well served the public interest and that any preconceived prejudice against them is factually unsupportable.

There can be no question, however, that at the very least—as the FCC concluded and the Court of Appeals itself conceded—"the record was essentially inconclusive." (FCC App. 49). If the proponents of divestiture could not make their public interest case in an exhaustive proceeding extending over five years, that should be the end of the matter.

It is a basic principle of administrative decisionmaking that "the proponent of a rule or order has the burden of poof." Admin. Proc. Act §7, 5 U.S.C. §556 (d). As a matter of common sense, a showing of an actual problem is a necessary predicate for adoption of a regulation to remedy the problem. ". . . [R]egulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." *City of Chicago* v. *FPC,* 458 F.2d 731, 742 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972). It is also the established federal rule that even where a presumption is properly created, a presumption "does not shift . . . the burden of proof in the sense of the risk of nonpersuasion." Fed. R. Evid. 301.

The burden to show the need for a proposed rule has particular force when the proposed rule would have retroactive effect to take away broadcast licenses that have been granted and repeatedly renewed over a period of many years after a finding by the FCC in each case that the license serves the "public interest, convenience and necessity." 47 U.S.C. §309(a). If, suddenly, those findings are to be reversed and hundreds of those licenses are to be found to be contrary to the public interest, a persuasive showing supporting such a result must be required.

The Court of Appeals, however, overcame the fact that there was no showing that existing affiliated newspapers and broadcast stations are contary to the public interest by the simple expedient of assuming that they are. The bases asserted by the court to support the "presumption" are entirely circular. Whether the broad statutory standard of encouraging "larger and more effective use of radio," or First Amendment policies, or FCC policies favoring diversity would in fact be substantially advanced by divestiture was the very question presented in the proceeding. To assume that divestiture would serve these policies is to engage in the ultimate in question-begging.

The court not only ruled that the Commission *could* have engaged in such a process; it held that the Commission was "compelled" to resolve the rulemaking proceeding in that manner. (FCC App. 60). The court was thus using the presumption as if it were a legislative body, creating the kind of controlling legal presumption that is a device for "concealing by fiction a change in the substantive law." *See* F. James, *Civil Procedure* §7.9 (1965). Whatever the propriety of such a presumption if created by Congress or if

developed by the FCC, the Court of Appeals clearly has no authority to engage in such a legislative function.

The impropriety of the court's decision in this respect is well-illustrated by the squarely contrary decision by the same court only three weeks later in *Home Box Office, Inc.* v. *FCC*, —F.2d— (No. 75-1280, D.C. Cir., Mar. 25, 1977). In *Home Box Office*, the Court of Appeals reversed FCC regulations on cable television because, *inter alia*, the FCC had failed to develop a record that showed clearly that the asserted problem addressed by the regulations actually existed. The Commission, said the court, "indulged in speculation and innuendo" in the absence of "a record that shows convincingly a problem to exist." (Slip Op. at 80-81). The court pointedly criticized the Department of Justice's arguments "premised on the unverified assumption that enhancement of competition—actual or potential—is always a good" and warned against basing a rule on "such a presumption." (*Id.* 64-65, n. 73).

It is no doubt frustrating to the Commission to be told by the Court of Appeals on March 1, 1977, that it cannot require a convincing showing that a problem exists before it imposes far-reaching regulations and then to be told by the same Court of Appeals on March 25, 1977, that it must require such a record before acting. To say that the Court of Appeals' diametrically opposed decisions reflect its differing policy preferences with respect to the substantive regulations at issue is little solace. The court's function is to insure that the agency is not arbitrary and capricious, not to require it to be so.

(c) The Court Substitutes Its Own Policies for Those of the FCC

The court's treatment of the competing policies taken into account by the Commission in considering divestiture was equally improper. A few examples illustrate the manner in which the court cavalierly dismissed those factors that were adverse to the result it sought and freely supplanted the FCC's judgment with its own.

For example, in weighing the divestiture question, the FCC expressed grave concern about the effect on the quality of broadcast service that would result from wholesale displacement of existing broadcast station owners. The disruption in continuity of service would mean, the FCC found, that "the new owner would lack the long knowledge of the community and would have to begin raw." (FCC App. 93). Continuity was also recognized as necessary "to give broadcasters an incentive to make the investment required to produce quality programming." (*Id.* 54).

The FCC has extensive experience in observing and evaluating the effect on broadcast service of continuity of ownership and management. In recognition of the public interest benefits of continuity, it has in the past established rules dealing with license transfers and "trafficking". 47 C.F.R. § 1.597 (1976). Its judgment in the present proceeding, relying on its accumulated experience and expertise, was that the loss of continuity would adversely affect broadcast service.

The court, however, dismissed this whole area of consideration as having "scant force in this case," reasoning that "a one-time alteration in the ownership structure of the broadcast industry should not effect

[sic] the public's interest in quality programming because the new owners will become the beneficiaries of any unofficial policy of continuity." (*Id.*). Thus, incredibly, the court dismissed concern about drastic disruption of service because, after the disruption had taken place, "continuity" could begin anew.

The court similarly dismissed in summary fashion the FCC's concern that disruption would be especially harmful because so many of the sales under a broad divestiture order would be to non-local interests. (*Id.* 93). The court simply eliminated this factor with the statement that "even if transfer to non-local owners entails extraordinary disruption, there is no basis for assuming that such transfers will result from divestiture." (*Id.* 55). The court's statement ignores the record, which included, among other things, an extensive and detailed study that analyzed the economic impact of widespread divestiture and concluded that purchasers of many divested stations would be multiple owners and nationwide conglomerates. (*Id.* 78). The statement also ignores the fact that a ban on ownership of a local broadcasting station imposed simultaneously on a large number of broadcasters would almost inevitably lead to widespread trading by local owners for distant stations. (*Id.* 83-84).

In short, having created a "presumption" to fill the void in the record to support divestiture, the court proceeded to eliminate contrary considerations by ignoring the record and replacing the FCC's evaluation of those considerations with its own. The court's action not only drastically affects the structure of the broadcast and print media, but also radically changes the relationship between regulatory agencies and reviewing courts. The decision is contrary to other decisions

of the same court and to the decisions of this Court. It should not be permitted to stand.

CONCLUSION

For the foregoing reasons, we respectfully urge the court to grant a writ of certiorari to review the judgment of the Court of Appeals below.

Respectfully submitted,

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APPENDIX

APPENDIX A

The first Amendment provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

The relevant provisions of the Administrative Procedure Act of 1946, as amended, are as follows:

> 5 U.S.C. § 556(d):
>
> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.
>
> 5 U.S.C. § 706
>
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise

reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The relevant provisions of the Communications Act of 1934, as amended, are as follows:

47 U.S.C. § 151:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio . . ., there is created a commission to be known as the "Federal Communications Commission". . . .

47 U.S.C. § 152(a):

The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided. . . .

47 U.S.C. § 309(a):

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the

Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 402(a):

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5.

APPENDIX B

Newspapers and Broadcast Stations Affected by the Court of Appeals Divestiture Order (As of April 15, 1977)

State	City	Newspapers	Broadcast Stations
Alabama	Anniston	*Anniston Star*	WHMA-AM-FM-TV
	Birmingham	*Birmingham News*	WAPI-AM-FM-TV
Arkansas	Camden	*Camden News*	KAMD/KWEH(FM)
	Fort Smith	*Southwest Times Record*	KFSA
	Springdale	*Springdale News*	KBRS
California	Fresno	*Fresno Bee*	KMJ-AM-FM-TV
	Modesto	*Modesto Bee*	KBEE-AM-FM
	Sacramento-Stockton[2]	*Sacramento Bee*	KFBK-AM-FM/ KOVR(TV)
	San Francisco	*San Francisco Chronicle*	KRON(TV)
	San Rafael	*San Rafael Independent-Journal*	KTIM-AM-FM
	Santa Barbara	*Santa Barbara News-Press*	KTMS-AM-FM
	Santa Cruz	*Santa Cruz Sentinel*	KSCO-AM-FM
	Santa Rosa	*Santa Rosa Press Democrat*	KSRD
Connecticut	Stamford	*Stamford Advocate*	WSTC/WYRS(FM)
District of Columbia	Washington[1]	*Washington Star*	WMAL-TV
	Washington	*Washington Post*	WTOP-AM-TV
Florida	Miami	*Miami News*	WIOD/WAIA(FM)
	Tampa	*The Tampa Tribune* and *The Tampa Times*	WFLA-AM-FM-TV
Georgia	Albany	*The Albany Herald*	WALB-TV
	Atlanta	*Atlanta Journal* and *Constitution*	WSB-AM-FM-TV
Hawaii	Honolulu	*Hawaii Times*	KOHO

State	City	Newspapers	Broadcast Stations
Idaho	Coeur d'Alene	*Coeur d'Alene Press*	KVNI
	Idaho Falls	*Idaho Falls Post Register*	KIFI-TV
Illinois	Bloomington	*Bloomington Pantagraph*	WJBC/WBNQ(FM)
	Champaign	*The Champaign News-Gazette*	WDWS-AM-FM
	Chicago	*Chicago Sun-Times* and *Daily News*	WFLD-TV
	Chicago	*Chicago Tribune*	WGN-AM-TV
	Decatur	*Decatur Herald* and *Review*	WSOY-AM-FM
	Effingham	*Effingham News*	WCRA/WCRC(FM)
	Galesburg	*Galesburg Register-Mail*	WGIL/WAAG(FM)
	Jacksonville	*Jacksonville Journal* and *Courier*	WLDS/WEAI(FM)
	LaSalle	*Daily News-Tribune*	WLPO-AM-FM
	Macomb	*Macomb Daily Journal*	WKAI-AM-FM
	Quincy	*Quincy Herald Whig*	WGEM-AM-FM-TV
	Rock Island	*Rock Island Argus*	WHBF-AM-FM-TV
	Waukegan	*Waukegan News-Sun*	WKRS
Indiana	Connersville	*Connersville News-Examiner*	WCNB-AM-FM
	Elkhart	*Elkhart Truth*	WTRC/WYEZ(FM)
	Fort Wayne	*Fort Wayne News-Sentinel*	WGL
	South Bend	*South Bend Tribune*	WSBT-AM-TV/ WWJY(FM)
	Warsaw	*Warsaw Times-Union*	WRSW-AM-FM
Iowa	Burlington	*Burlington Hawkeye*	KBUR-AM-FM
	Cedar Rapids	*Cedar Rapids Gazette*	KCRG-AM-TV
	Dubuque	*Dubuque Telegraph-Herald*	KDTH/KFMD(FM)
	Marshalltown	*Marshalltown Times-Republican*	KFJB-AM-FM
	Mason City	*Globe-Gazette*	KGLO-AM-TV

State	City	Newspapers	Broadcast Stations
Kansas	Arkansas City	*Arkansas City Traveler*	KSOK
	Coffeyville	*Coffeyville Journal*	KGGF
	Dodge City	*Dodge City Daily Globe*	KGNO-AM-FM
	Garden City	*Garden City Telegram*	KIUL
	Manhattan	*Manhattan Mercury*	KMAN/KMKF(FM)
	McPherson	*McPherson Sentinel*	KNEX-AM-FM
	Topeka	*Topeka State Journal* and *Capital*	WIBW-AM-FM-TV
Kentucky	Bowling Green	*Park City Daily News*	WKCT/WDNS(FM)
	Corbin	*Corbin Times-Tribune*	WCTT-AM-FM
	Louisville	*Louisville Courier-Journal* and *Times*	WHAS-AM-TV/ WNNS(FM)
	Owensboro	*Owensboro Messenger* and *Inquirer*	WOMI/WBKR(FM)
	Paducah	*Paducah Sun-Democrat*	WPSD-TV
Louisiana	Baton Rouge	*Baton Rouge Advocate* and *State Times*	WJBO/WFMF(FM)/ WBRZ(TV)
	Shreveport	*Shreveport Journal*	KSLA-TV
	Shreveport[2]	*Shreveport Times*	KWKH/KROK(FM)
Maine	Portland	*Portland Express* and *Portland Press Herald*	WGAN-AM-FM-TV
Maryland	Baltimore	*Baltimore News-American*	WBAL-AM-FM-TV
		Baltimore Sun	WMAR-FM-TV
Massachusetts	Brockton	*Brockton Enterprise & Times*	WBET/WCAV(FM)
	Northampton	*Northampton Hampshire Gazette*	WHMP-AM-FM
	Worcester	*Worcester Telegram, The Evening Gazette* and *The Sunday Telegram*	WTAG
Michigan	Albion	*Albion Recorder*	WALM
	Benton Harbor	*The Herald Palladium*	WHFB-AM-FM
	Detroit	*Detroit News*	WWJ-AM-FM-TV
	Owosso	*Owosso Argus Press*	WOAP-AM-FM

State	City	Newspapers	Broadcast Stations
Minnesota	New Ulm	*New Ulm Daily Journal*	KNUJ-AM-FM
Mississippi	Columbus	*Columbus Commercial Dispatch*	WCBI-AM-TV
	Greenville	*Delta Democrat-Times*	WDDT
	Jackson	*Jackson Clarion-Ledger* and *Daily News*	WSLI/WJFR(FM)/ WJTV(TV)
	Meridian	*Meridian Star*	WMOX
	Meridian	*Meridian Star*	WTOK-TV
Missouri	Columbia	*Columbia Daily Tribune*	KFRU
	St. Louis	*St. Louis Post-Dispatch*	KSD-AM-TV
	St. Louis	*St. Louis Globe-Democrat*	KTVI(TV)
	Warrensburg	*Warrensburg Star-Journal*	KOKO
Montana	Miles City	*Miles City Star*	KATL
Nebraska	Hastings	*Hastings Tribune*	KHAS-AM-TV
	Norfolk	*Norfolk Daily News*	WJAG-AM-FM
Nevada	Las Vegas	*Las Vegas Review-Journal*	KORK-AM-FM-TV
New Jersey	Asbury Park	*Asbury Park Press*	WJLK-AM-FM
New Mexico	Grants	*Grants Daily Beacon*	KMIN
New York	New York	*New York Daily News*	WPIX-FM-TV
		New York Times	WQXR-AM-FM
	Olean	*Olean Times-Herald*	WHDL/WEBF(FM)
	Rochester	*Rochester Democrat* and *Chronicle* and *Rochester Times-Union*	WHEC-TV
	Syracuse	*Syracuse Post-Standard* and *Herald-Journal*	WSYR-AM-FM-TV
	Watertown	*Watertown Daily Times*	WWNY-AM-TV
North Carolina	Asheboro	*Asheboro Courier-Tribune*	WGWR/WCSE(FM)
	Asheville	*Asheville Citizen-Times*	WWNC
	Durham	*Durham Herald* and *Sun*	WDNC/WDCG(FM)
	Hickory	*Hickory Record*	WHKY-AM-FM-TV

State	City	Newspapers	Broadcast Stations
North Dakota	Fargo	*The Fargo Forum*	WDAY-AM-FM-TV
Ohio	Akron	*Akron Beacon-Journal*	WAKR-AM-TV/ WAEZ(FM)
	Ashtabula	*The Ashtabula Star-Beacon*	WREO-AM-FM
	Cincinnati	*Cincinnati Post*	WCPO-TV
	Cleveland	*Cleveland Press*	WEWS-TV
	Columbus	*Columbus Dispatch*	WBNS-AM-FM-TV
	Dayton	*Dayton News* and *Journal-Herald*	WHIO-AM-FM-TV
	Elyria	*The Elyria Chronicle-Telegram*	WEOL/WBEA(FM)
	Findlay	*Findlay Courier*	WFIN/WHMQ(FM)
	Newark	*Newark Advocate & American Tribune*	WCLT-AM-FM
	Warren	*Warren Tribune-Chronicle*	WHHH
	Wooster	*Wooster Daily Record*	WWST-AM-FM
	Youngstown	*Youngstown Vindicator*	WFMJ-AM-TV
Oklahoma	Ardmore	*Ardmore Ardmoreite*	KVSO
	Durant	*Durant Democrat*	KSEO-AM-FM
	Enid	*Enid News-Eagle*	KCRC/KNID-FM
	Oklahoma City	*Oklahoma City Oklahoman* and *Times*	WKY
	Ponca City	*Ponca City News*	WBBZ
	Shawnee	*Shawnee News-Star*	KGFF
	Stillwater	*Stillwater News-Press*	KSPI-AM-FM
Oregon	Grants Pass	*Grants Pass Courier*	KAGI
	Portland	*Portland Oregonian* and *Oregon Journal*	KOIN-AM-FM-TV
Pennsylvania	Clearfield	*Clearfield Progress*	WCPA-AM-FM
	DuBois	*DuBois Courier Express*	WCED-AM-FM
	Easton	*Easton Express*	WEEX/WQQQ(FM)
	Erie	*Erie Morning News* and *Times*	WSEE(TV)
	Gettysburg	*Gettysburg Times*	WGET-AM-FM
	Harrisburg	*Harrisburg Patriot* and *News*	WTPA-FM-TV

State	City	Newspapers	Broadcast Stations
	Huntingdon	*Huntingdon News*	WHUN/WRLR(FM)
	Johnstown	*Johnstown Tribune-Democrat*	WJAC-AM-FM-TV
	Lancaster	*Lancaster Intelligencer Journal* and *New Era*	WGAL-TV
	Lansdale	*North Penn Reporter*	WNPV
	Pittsburgh	*Pittsburgh Post-Gazette*	WWSW/WPEZ(FM)
	Reading	*Reading Times* and *Eagle*	WEEU
	Scranton	*Scranton Times*	WEJL/WEZX(FM)
Rhode Island	Providence	*Providence Journal Bulletin*	WEAN/WPJB(FM)
	Woonsocket	*Woonsocket Call*	WWON-AM-FM
South Carolina	Anderson	*Anderson Independent* and *Daily Mail*	WAIM-AM-TV/ WCAC(FM)
	Greenville[2]	*Greenville News* and *Piedmont*	WFBC-AM-FM-TV
	Orangeburg	*Orangeburg Times & Democrat*	WTND
Tennessee	Johnson City	*Johnson City Press-Chronicle*	WETB
	Knoxville	*Knoxville-News Sentinel*	WNOX
	Memphis	*Commercial Appeal* and *Memphis Press-Scimitar*	WMC-AM-FM-TV
Texas	Dallas	*The Dallas Times Herald*	KDFW-TV
	Dallas	*Dallas Morning News*	WFAA-AM-TV/ KZEW(FM)
	Fort Worth	*Fort Worth Star-Telegram*	WBAP/KSCS(FM)
	Houston	*Houston Post*	KPRC-AM-TV
	Temple	*Temple Telegram*	KCEN-TV
	Texarkana	*The Texarkana Gazette-News*	KCMC/KTAL-FM-TV
Utah	Salt Lake City	*Deseret News*	KSL-AM-FM-TV

State	City	Newspapers	Broadcast Stations
Virginia	Fredericksburg	*Fredericksburg Free Lance-Star*	WFLS-AM-FM
	Newport News	*Newport News Daily Press* and *Times-Herald*	WGH-AM-FM
	Norfolk	*Norfolk Ledger-Star* and *Virginian-Pilot*	WTAR-AM-TV/ WKEZ(FM)
Washington	Spokane	*Spokane Chronicle*	KHQ-AM-FM-TV
	Tacoma	*Tacoma News-Tribune*	KTNT/KNBQ(FM)
West Virginia	Bluefield	*Bluefield Daily Telegraph*	WHIS-AM-TV/ WHAJ(FM)
	Morgantown	*The Morgantown Dominion-Post*	WAJR-AM-FM
Wisconsin	Janesville	*Janesville Gazette*	WCLO/WJVL(FM)
	Madison	*Capital Times*	WIBA-AM-FM
	Milwaukee	*Milwaukee Journal* and *Sentinel*	WTMJ-AM-TV/ WKTI(FM)
	Wisconsin Rapids	*Wisconsin Rapids Tribune*	WFHR/WRW(FM)
Wyoming	Cheyenne	*Wyoming Eagle* and *Wyoming State Tribune*	KFBC-AM-FM
Puerto Rico	San Juan	*El Mundo*	WKAQ-AM-FM-TV

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[1] Agreement to sell or exchange cross-owned holding(s) has been announced.

[2] FCC notice of application for reassignment of cross-owned station tendered for filing or accepted by the Commission.